United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7149

B P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EVELYN DUTIL

Administratrix of the Estate of

RAYMOND DUTIL,

Plaintiff-Appellant,

V.

MARLIN M. MAYETTE,

Defendant-Appellee

BRIEF OF DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT.

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EVELYN DUTIL
Administratrix of the Estate of
RAYMOND DUTIL

Plaintiff-Appellant

V.

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Defendant-Appellee

STATEMENT OF THE CASE

This wrongful death action raises two issues only one of which was reached by the Court below. In its opinion, the District Court, Holden, C.J., ruled that the plaintiff, having failed to procure ancillary letters of administration in Vermont, lacked the capacity to bring suit. Having dismissed the complaint on this ground, Judge Holden refrained from reaching a decision on the second issue, whether the suit was barred by the two-year statute of limitations, 14 V.S.A. § 1492(a). App. 24-26.

Plaintiff's decedent Raymond Dutil was involved in an automobile accident in Vermont on May 15, 1971, and as a consequence, died that same day. 1/

The plaintiff-appellant, who had been appointed the administratrix of the Estate of Raymond Dutil on November 14, 1972, in Massachusetts, alleged the wrongful death of Mr. Dutil in her Complaint, which was dated May 16, 1973 and filed in the District Court on May 18, 1973. App. 1,3.

1/ While the date of his death does not appear in plaintiff's Complaint, App. 2, plaintiff acknowledged during proceedings below that the date of death was May 15, 1971. Plaintiff's memo of law dated July 9, 1974, at p. 3; App. 15.

QUESTIONS PRESENTED

1. Is an action brought pursuant to Vermont's Wrongful Death Statute barred by the statute of limitations when the cause of action accrued on May 15, 1971, the Complaint is dated May 16, 1973, and the Complaint is filed with the Court on May 18, 1973?

2. Does an administrator appointed in a foreign jurisdiction, who does not procure ancillary letters of administration in Vermont, lack capacity to maintain a wrongful death action in Vermont?

ARGUMENT

A. THE STATUTE OF LIMITATIONS

This issue was not reached by the District Court, but in the interests of judicial economy it should be resolved here in the event this Court decides the capacity question in plaintiff's favor.

Plaintiff's decedent died on May 15, 1971. Plaintiff's Complaint, dated May 16, 1973, was filed in the Court below on May 18, 1973. In Vermont, a wrongful death claim must be "commenced within two years from" the date of death. 14 V.S.A. § 1492(a); Mier's Admr. v. Boyer, 124 Vt. 12 (1963). Consequently, the period provided in the statute of limitations in this action expired May 15, 1973. 1 V.S.A. § 138; Hicks' Estate v. Blanchard, 60 Vt. 673, 678-79 (1888); Anno., 20 A.L.R.2d 1249; 51 Am. Jur.2d, Limitation of Actions, § 59, at 636.

In proceedings below plaintiff argued that since the day of death should be excluded in computing the two-year period, the action could be commenced as late as May 16, 1973. Examples in the preceding citations and a simple mathematical count clearly demonstrate, however, that the two-year period elapsed on May 15 not May 16. If the first day, the date of death, were included, the two year period would have elapsed on May 14, 1973. 51 Am. Jur.2d, supra, at 638; Brown v. Emerson Brick Co., 15 Ga. App. 332, 83 S.E. 160 (1914).

Were Plaintiff's contention in this latter respect to prevail, she still faces the further obstacle that her Complaint was not filed until May 18,

1973. There is no conflict between the law of Vermont and the Federal Rules of Civil Procedure as to when an action is deemed "commenced." Both V.R.C.P. 3 and F.R.C.P. 3 provide that "[a] civil action is commenced by filing a complaint with the court." See also 12 V.S.A. § 466 which provides:

> For the purpose of determining whether a period of limitation prescribed in this chapter has run, an action shall be deemed commenced upon filing of the complaintwith the clerk of the court in which the action is being brought if the action is commenced by filing or upon service of the summons and complaint if the action is commenced by service.

Since the Complaint was not filed until May 18, 1973, plaintiff was too late in any event.

Plaintiff-appellant also argued below that Jacques v. Jacques, 128 Vt. 140, 141 (1969), holding that "under our statute, the time of commencement is computed at the date of the complaint," controls. 2/ Apart from the manifest fact that May 15 was the cutoff date, and a holding in this Circuit that Federal Rule 3 controls,3/ Jacques no longer is the law in Vermont. The statute construed by the Vermont Supreme Court to control the commencement of a cause of action, 12 V.S.A. § 771 (No. 222 Public Acts, 1969 Adj. Sess.), was repealed by 12 V.S.A. § 466 (No. 185 Public Acts, 1971 Adj. Sess. §§ 233, 237).

2/ See also, Bethel Mills, Inc. v. Whitcomb, 116 Vt. 357, 361 (1950); McAllister v. Northern Oil Co., Inc., 115 Vt. 465, 466 (1949); Kessler v. Emmel, 115 Vt. 54, 56 (1947); Glass v. Storr, 113 Vt. 243 (1943).

3/ Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968); See Hanna v. Plumer, 380 U.S. 460 (1965).

Thus, the law in Vermont today and at the time suit was brought herein equates "commencement" with filing of the Complaint (or service of the summons and complaint, whichever is earlier) not the issuance or date of the complaint as held in Jacques, supra.

One further point was raised by plaintiff below. She contended that the defendant may have resided outside the state, thereby tolling the statute of limitations for some period of time. See 14 V.S.A. § 1492(a), which provides:

> After such cause of action accrues and before such two years have run, if the person against whom it accrues is absent from and resides out of the state and has no known property within the state which can by common process of law be attached, the time of his absence shall not be taken as part of the time limited for the commencement of the action. 4/

No evidence on this point was presented by plaintiff, however. The plaintiff is bound by her allegation in the complaint that the "Defendant is a citizen of the State of Vermont." App. 2. Without evidence to the contrary, it must be presumed that defendant's residency remained in Vermont from at least the time of the accident to the present.

4/ A similar tolling remedy has had an interesting history in Vermont. With the advent of a long-arm jurisdictional statute related to causes of action arising from the operation of motor vehicles, 12 V.S.A. § 891 et seq., the Vermont Supreme Court rules that in such cases the statute of limitations was not tolled during the defendant's non-residency and absence from the State where substitute service was available. Law's Adm'r. v. Culver, 121 Vt. 285 (1959); Reed v. Rosenfield, 115 Vt. 76 (1947). In 1961, however, the Vermont legislature amended 12 V.S.A. § 892 by providing that "the availability of such manner of service shall not make the provisions of section 552 of this title inoperative, relative to tolling of the statute of limitations." Section 552 of Title 12 is similar in effect to the tolling provision related to wrongful death actions, 12 V.S.A. § 1492(a). Aside from the arguable irrationality of such amendment on equal protection grounds, the amendment did not relate to the provisions of § 1492(a). Therefore, plaintiff-appellant's contention, even if proved by her, would not serve to toll the statute of limitations in the case at bar.

For the foregoing reason, plaintiff's action was commenced two years and three days from the date the cause of action accrued or, assuming that the date of the complaint is controlling - - one day too late.

B. LACK OF CAPACITY

The most recent case dealing with this issue is Weinstein v. Medical Center Hospital of Vermont, Inc., 358 F. Supp. 297 (D. Vt. 1973), the holding of which clearly calls for dismissal on the ground that the plaintiff is without capacity to maintain the instant action. Appellant does not dispute the applicability of Weinstein but maintains that that decision was wrong. Plaintiff relies on dictum found in Brown v. Perry, 104 Vt. 66 (1931), a case Weinstein discussed and distinguished.

Brown v. Perry, supra, involved an action brought in a Vermont court pursuant to New Hampshire's wrongful death statute to recover damages alleged to have resulted from an automobile accident occurring in New Hampshire. The plaintiff, who had been appointed the administrator of decedent's estate in both Vermont and New Hampshire, was a resident of Vermont. The decedent at the time of his death was a resident of New Hampshire, and the defendants were residents of Vermont. The Brown court stated in passing -- since no issue was raised concerning, nor did the outcome of the case turn upon, the capacity of the plaintiff as administrator:

> The plaintiff, in his declaration, has alleged his appointment as administrator in New Hampshire as well as in Vermont, and so the action is maintainable by him in either capacity.

Id. at 71 (dictum). In writing this pronouncement, the Court in Brown did not address itself to the cases in Vermont holding that foreign administrators are

without authority to prosecute decedent's claims unless so authorized by ancillary letters issued in Vermont. See cases cited in Weinstein, supra at 298. Moreover, the Brown Court may have expressed itself in such terms, because the statute which gave rise to the cause of action and its remedy was New Hampshire's and the accident and death occurred in New Hampshire (the "situs" of the claim).

Finally, subsequent amendment to Vermont's Wrongful Death Statute clearly dictates against applying the Brown dictum to the facts of the instant case. The 1961 amendment is explained, and its impact analyzed, in Weinstein, supra, at 299. Surely, the Court in Weinstein was correct in holding,

> it is implicit in the 1961 enactment that the plaintiff is without standing to procure a judgment or settle a claim under the statute without the aid of ancillary administration in Vermont . . .[under circumstances where the wrongful death statute itself mandates that] ". . . the probate court having jurisdiction of the decedent's estate shall decree the net amount recovered pursuant to the final judgment order of the county court or superior judge . . . ."

Id. at 299 & n.1.5/

Plaintiff-appellant argues that Vermont's wrongful death law provides that the action "shall be brought in the name of the personal representative," without specifying that the representative be a domestic administrator. This is to ignore, however, a considerable amount of Vermont case law holding that foreign administrators are not qualified to pursue

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5/ In reply to the elaboration in Weinstein based on the 1961 enactment, plaintiff cites and discusses Denmick v. R. R. Co., 103 U.S. 11 (1880), wherein a New York administratrix was permitted to bring a wrongful death action in New York against a New Jersey defendant for damages resulting from an accident occurring in New Jersey. The short answer to plaintiff's reliance on this case, is that she did not institute wrongful death proceedings in a Massachusetts forum.

claims in Vermont when these claims arise in Vermont. See Weinstein, supra, at 298, and cases cited therein. See also Abbott v. Abbott, 112 Vt. 449 (1942), wherein it was made clear that the net proceeds derived from a wrongful death action under Vermont statute must be determined by, and distributed in accordance with, the directions of the Vermont probate court having appointed or qualified the plaintiff administrator. When read in conjunction with this common-law background and in pari materia with the wrongful death statute as a whole, it is abundantly clear that the legislature had no intention of expanding capacity or standing requirements, especially in circumstances other than presented in Brown, supra.

Citing cases in other federal districts, appellant urges this Court to follow what she calls the "modern trend in wrongful death actions." Appellant's brief at 5. It is interesting to note that in Siverling v. Lee, 90 F. Supp. 659 (E. D. Mich. 1950), the foreign administrator (Ohio) could not qualify as a domestic representative (Michigan) because he was not a resident of the forum state. To the same effect, see Reed v. Shilcutt, 119 F. Supp. 652 (E. D. Vir. 1946), cited by appellant at p. 6. That is not the situation in Vermont, however. The plaintiff could qualify as a Vermont administratrix to pursue the wrongful death action without becoming a Vermont resident.

In no case cited by appellant does the wrongful death statutory scheme resemble Vermont law which specifically contemplates a two-tiered mechanism to effectuate the distribution of the proceeds of the suit. Whatever be the law in those jurisdictions relied upon by appellant, Vermont has not chosen to follow it. For a collection of the cases and the varying

viewpoints expressed on this subject matter, see Anno., 52 A.L.R.2d 1048.[6/]

Finally, appellant urges this court to allow her to secure ancillary letters of administration should it agree with the District Court's ruling on capacity. There is considerable authority, however, which indicates that appointment of a proper administrator does not relate back to the commencement of the action and, therefore, the statutory period having elapsed the action cannot again be maintained. E.g., Kiley v. Lubelsky, 315 F. Supp. 1025 (D.C.S.C. 1970); Burket v. Aldridge, 241 Md. 423, 216 A.2d 910 (1966); Pearson v. Anthony, 218 Iowa 697, 254 N.W. 10 (1934).

6/ Plaintiff's statement, brief at 7, that she "will take the entire proceeds" is immaterial to the outcome of this case and certainly has no foundation in the record.

CONCLUSION

The Court should affirm the order of the District Court because (1) the two-year period of limitation clearly elapsed before suit was brought in this action and (2) the plaintiff lacked the representative capacity to institute suit in Vermont.

May 5, 1975.

Respectfully submitted,
DINSE, ALLEN & ERDMANN

By: James L. Morse

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EVELYN DUTIL, Administratrix of the Estate of RAYMOND DUTIL	:	
vs	:	CERTIFICATE OF SERVICE
MARLIN M. MAYETTE	:	

I, JAMES L. MORSE, a member of the firm of Dinse, Allen & Erdmann, hereby certify that I mailed 25 copies of Appellee's brief in the above-captioned matter to the Court of Appeals, and I mailed two copies of the brief to Robert D. Rachlin, Esquire, postage prepaid, at his usual address, on May 12, 1975.

Burlington, Vermont. May 12, 1975.

DINSE, ALLEN & ERDMANN

By: James L. Morse